

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

IN RE ANTHONY W., a Person Coming
Under the Juvenile Court Law.

H033939
(Santa Clara County
Super. Ct. No. JV33525)

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY W.,

Defendant and Appellant.

Anthony W., a minor, appeals from an order of wardship (Welf. & Inst. Code, § 602) entered following a finding by the juvenile court that he committed a residential burglary. The court placed Anthony on probation on the condition that he serve 113 days in juvenile hall.

On appeal, Anthony contends that there was insufficient evidence to support the juvenile court's true finding that he committed a burglary. We disagree that the evidence was insufficient to sustain a finding of burglary.

Facts and Proceedings Below

In December 2007, Kyle and his mother Linsey¹ lived in a single story house in San Jose. Kyle and Anthony had been friends for about two years. Anthony often spent the night at the Kyle's home. Kyle had met some of Anthony's friends including a boy named Ethan.

Kyle ended his friendship with Anthony after Anthony took Linsey's ATM card without her permission and used it to take cash from her account. When Linsey tried to confront Anthony about the theft, he jumped out of Kyle's bedroom window and ran away. Ultimately, Anthony admitted that he had taken and used Linsey's ATM card, but he promised to pay her back.

When Anthony did not make good on his promise, Linsey informed the police that Anthony had admitted the ATM card theft. A felony warrant issued for Anthony's arrest. Subsequently, Anthony left threatening messages on Kyle's "My Space" page.

On January 18, 2008, around 1:05 a.m. Linsey was home alone when her dog started growling and barking in Kyle's bedroom. She heard the window in Kyle's room open. Thinking that Kyle had locked himself out and was trying to get in without waking her, Linsey called out, but there was no reply.

Linsey went into Kyle's room and saw the dog "pointing" at the sliding bedroom window. The window, which overlooked the patio, had been pushed sideways on the metal track and was wide open. The window was always kept locked, but if the "rim lock" was not tightened all the way the window could be opened from the outside by pushing the window in and sliding it to the right. It was Anthony who showed Kyle how to open the window this way. Previously, Kyle, Anthony and two other boys, Nick and John, had entered Kyle's room through the window when it had been locked.

¹ We refer to the parties by their first name because some of them are minors. No disrespect is intended.

Linsey turned on the light in Kyle's room, closed the window and called the police. Linsey heard scuffling outside the closed window. The dog was still barking as if something was wrong. Nothing was missing from Kyle's room. Kyle's plasma television and many pairs of expensive sneakers were still in his room.

San Jose Police Officer Panighetti arrived at Linsey's house at 1:17 a.m. He saw that the gate that led from the front of the house into the patio was broken. While looking for the address, the officer drove past the house. As he did so, he saw "two individuals running from the south side of the residence . . . across the patio towards the gate." Later, Officer Panighetti identified Anthony as one of the two individuals. The other individual was identified as Ethan.

As Officer Panighetti got out of his patrol car and approached the house, Anthony and Ethan ran straight toward him. Ethan ran out of the officer's line of sight, although he remained in the yard. According to Officer Panighetti, as he was walking toward the house Anthony did not see him. Anthony crouched down and moved to within 15 or 20 feet of the officer. Anthony was peeking around the broken gate and looking down the street in the direction the officer had driven. Anthony was not wearing a mask. The house lights, or outdoor motion sensor lights, and the streetlights illuminated the area.

Officer Panighetti, believing that he was going to be ambushed, drew his gun. He identified himself as a San Jose police officer and ordered Anthony and Ethan to stop and show their hands. Neither Anthony nor Ethan complied with his order. Anthony looked at the officer, stood up and ran back across the patio, breaking the fence as he fled the scene. Ethan ran into an adjoining yard and was detained by another officer. Ethan implicated Anthony in the incident.

Kyle testified that he was at the movie theater with a friend when his mother contacted him and told him to return home because someone had tried to break into their house. Immediately, Kyle went home. He saw Ethan in a police car. He recognized him because he "was one of [his] friends."

The police found a mask and a pair of gloves in the yard of Linsey and Kyle's house. Photographs of the yard and the broken gate were admitted in evidence at Anthony's contested jurisdiction hearing.

Acting on the information that Ethan supplied and an outstanding warrant for Anthony's arrest, at about 4:55 a.m., San Jose police officers went to Anthony's house. Anthony's house was about two miles from Kyle's house. The officers were advised that Anthony "was known as a runner and . . . that he'd been looking out windows" of his house. San Jose Police Officer Short was directed by his sergeant to go into the back yard in case Anthony tried to flee. There were two other officers with him, Officer Barthelemy and Officer Gonzalez. The motion sensor lights in the back yard turned on. Officer Short heard other officers knock and say " 'San Jose Police.' "

Shortly thereafter, Officer Short heard a sliding window open and saw Anthony jump out of his bedroom window into the back yard. Immediately, Officer Barthelemy took Anthony into custody. Officer Panighetti, accompanied by other officers, went into Anthony's house and found a Hispanic youth, Mark B., in bed in Anthony's bedroom.

Mark testified at the jurisdiction hearing that he and Anthony were together throughout the afternoon and night of January 16 until the police arrived. They went to sleep in the same bed about midnight. Anthony woke Mark when he jumped out of his bedroom window after the police arrived. Mark denied telling the defense investigator that Anthony and Ethan were friends, but acknowledged that they were "acquaintances." Mark knew that Anthony and Kyle were no longer friends. Mark contacted Anthony's attorney "to tell them what happened that night." He testified that he was in court "testifying for his alibi that night." Mark admitted that he told the prosecutor's investigator that Anthony was not in the bedroom with him the entire night. However, he "was wrong in saying that." Mark admitted that he had been drinking alcohol before going to sleep.

Anthony's father testified that Anthony and his friends were at home the entire night. However, he acknowledged that he went to sleep around 1:00 or 1:30 a.m. Further, he admitted that Anthony was not supposed to stay at the house because of the outstanding arrest warrant.

Since September 2007, Anthony had had four Welfare and Institutions Code section 602 petitions sustained for vehicle theft, felony false personation, driving without a license, and several probation violations.

Following the contested jurisdiction hearing, the juvenile court found true the allegations in Petition E, which had been filed on January 20, 2009, that Anthony committed burglary in the first degree and adjudged Anthony a ward of court.

As noted, on February 24, 2009, the court placed Anthony on probation on the condition that he serve 113 days in juvenile hall. Anthony filed a notice of appeal the same day.

Standard of Review

Under applicable standards of appellate review, we must view the facts in the light most favorable to the delinquency findings, and presume in support of the judgment the existence of every fact that the juvenile court could reasonably find from the evidence. (*In re Roderick P.* (1972) 7 Cal.3d 801, 808-809, [holding principles of appellate review in adult criminal trials apply to delinquency proceedings]; see *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Discussion

Anthony contends that there was insufficient evidence to support the true finding that he committed a burglary. Anthony asserts that the room was not ransacked, nothing was disturbed and nothing was stolen from Kyle's room. There was no dirt or debris inside the room. There were no burglary tools found in the room. There were no shoeprints or fingerprints found in the room or on the inside of the windowpane. The lock of the inside of the window was undamaged. There had never been a screen on the

outside of the window. In short, Anthony argues, there is no reasonable, credible, or solid evidence indicating that there was an entry. Respectfully, for the following reasons we disagree.

In order to be found to have committed a residential burglary, the evidence must establish that Anthony entered an inhabited dwelling with the intent to commit larceny or any felony. (Pen. Code, §§ 459, 460, subd. (a).) In examining the evidence, we focus on the evidence that did exist rather than on the evidence that did not. (*People v. Story* (2009) 45 Cal.4th 1282, 1299.) Intent to steal may be inferred from flight after being discovered or from the totality of the facts and circumstances. (*People v. Frye* (1985) 166 Cal.App.3d 941, 947.)

For burglary, "it has long been settled that '[a]ny kind of entry, complete or partial, . . . will' suffice. [Citation.] All that is needed is entry 'inside the premises' [citation], not entry inside *some inner part of* the premises." (*People v. Valencia* (2002) 28 Cal.4th 1, 13 (*Valencia*).)

In *Valencia*, the Supreme Court granted review "to determine whether penetration into the area behind a window screen amounts to an entry of a building within the meaning of the burglary statute when the window itself is closed and is not penetrated."² (*Valencia, supra*, 28 Cal.4th at pp. 3-4.) At the outset, the court noted that California has "greatly expanded" the common law definition of burglary as the breaking and entering of a dwelling in the nighttime. (*Id.* at p. 7.) Under California's more expansive burglary law, "[t]here is no requirement of a breaking; an entry alone is sufficient. The crime is not limited to dwellings, but includes entry into a wide variety of structures. The crime need not be committed at night." (*Ibid.*, citing *People v. Davis* (1998) 18 Cal.4th 712, 720-721.) Furthermore, the *Valencia* court observed, " 'burglary remains an entry

² In *Valencia*, the defendant "removed a window screen from a bathroom window of the . . . house and tried unsuccessfully to open the window itself." (*Valencia, supra*, 28 Cal.4th at p. 4.)

which invades a possessory interest in a building." [Citation.] . . . " 'Burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation--the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence. The laws are primarily designed, then, not to deter the trespass and the intended crime, which are prohibited by other laws, so much as to forestall the germination of a situation dangerous to personal safety.' [The burglary statute], in short, is aimed at the danger caused by the unauthorized entry itself." ' ' ' (Ibid.)

"Two separate approaches have been taken by the courts to determine whether an entry was effectuated. The first approach examines whether the defendant crossed the boundary separating the interior air space of the building from the outdoors. The second approach looks to the reasonable expectations of the building occupants to be free from an intrusion." (*People v. Wise* (1994) 25 Cal.App.4th 339, 345.) "An airspace test . . . may be helpful when the question is whether there is the 'slightest partial entry' of a building" (*Valencia, supra*, 28 Cal.4th at pp. 10-11.)

"One treatise writer explained that the test for an entry is whether 'any part of the defendant's person passes the line of the threshold' of the building. [Citation.] Another stated that the requirement for entering is satisfied if any part of the intruder's body 'passes over the line of the door or window.' [Citation.]" (*People v. Wise, supra*, 25 Cal.App.4th at p. 345.) "Entry that is *just barely* inside the premises, even if the area penetrated is small, is sufficient." (*Valencia, supra*, 28 Cal.4th at p. 15.)

Furthermore, "it long has been established that a burglary also can be committed by using an instrument to enter a building." (*People v. Davis, supra*, 18 Cal.4th at p. 716, (*Davis*).) Although the *Davis* court cautioned that is "important to establish reasonable limits as to what constitutes an entry by means of an instrument for purposes of the burglary statute" (*id.* at p. 719), "[t]he crucial issue . . . is whether [the] insertion . . . was

the type of entry the burglary statute was intended to prevent. In answering this question, we look to the interest sought to be protected by the burglary statute in general, and the requirement of an entry in particular." (*Id.* at p. 720.)

The question here is whether Anthony's act of pushing in the window in order to get it over the rim lock, which is how the window had to be opened when locked, is sufficient to constitute an entry into the building. We hold that it is. Similar to kicking open a door, when Anthony pushed in the window in order to defeat the lock, albeit minimally, his hands entered the space that had been enclosed by the window. In effect, Anthony's hands broke the plane of the window as he pushed it in and slid it to the right.

In addition, the window itself penetrated into the building. (See *People v. Calderon* (2007) 158 Cal.App.4th 137, 144-145, [kicking in the door of a home is itself sufficient to constitute a burglary, because the door itself becomes an instrument used to penetrate the building].) Under the circumstances of this case, we have little doubt that even the minimal entry achieved by pushing in the window is "the type of entry the burglary statute was intended to prevent." (*Davis, supra*, 18 Cal.4th at p. 720.) Such an entry "violates the occupant's possessory interest in the building" (*Id.* at p. 722.) No one can dispute that Anthony's act "threaten[ed] ' ' 'the germination of a situation dangerous to personal safety.' " ' [Citation.]" (*Valencia, supra*, 28 Cal.4th at p. 13.) To avoid being discovered, we can infer that as he opened the window Anthony was wearing the mask and gloves that the police found in the yard. Had Linsey seen Anthony masked and gloved attempting to open the window, the situation "might indeed have erupted into violence." (*People v. Nible* (1988) 200 Cal.App.3d. 838, 845.)

Furthermore, Anthony fled to avoid arrest and left behind a mask and gloves; and previously, he had taken an ATM card from Linsey. From this evidence it is reasonable to infer that Anthony intended to steal from Linsey and/or Kyle.

Accordingly, we conclude that there was sufficient evidence to support the juvenile court's true finding that Anthony committed a burglary.

Disposition

The jurisdictional and dispositional orders are affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.